

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

JOHN DOE 2, by and through	.	Civil Action No. 1:18cv846
his Father and Next Friend,	.	
JOHN DOE 1,	.	
	.	
Plaintiff,	.	
	.	
vs.	.	Alexandria, Virginia
	.	September 7, 2018
	.	10:23 a.m.
THE FAIRFAX COUNTY SCHOOL	.	
BOARD, FAIRFAX COUNTY PUBLIC	.	
SCHOOLS, JOHN BANBURY, EILEEN	.	
HOPPOCK, and NANCY KRELOFF,	.	
employees of Fairfax County	.	
Public Schools sued in his or	.	
her official and individual	.	
capacity, jointly and	.	
severally,	.	
	.	
Defendants.	.	
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TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE LEONIE M. BRINKEMA  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:	JESSE R. BINNALL, ESQ. Harvey & Binnall, PLLC 717 King Street, Suite 300 Alexandria, VA 22314
FOR THE DEFENDANTS:	MICHAEL E. KINNEY, ESQ. Turner & Kinney, P.C. 20 West Market Street Leesburg, VA 20176
OFFICIAL COURT REPORTER:	ANNELIESE J. THOMSON, RDR, CRR U.S. District Court, Third Floor 401 Courthouse Square Alexandria, VA 22314 (703)299-8595

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 P R O C E E D I N G S

2 THE CLERK: Civil Action 18-846, John Doe No. 2 v.  
3 The Fairfax County School Board, et al. Would counsel please  
4 note their appearances for the record.

5 MR. BINNALL: May it please the Court. Jesse Binnall  
6 on behalf of John Doe No. 2.

7 THE COURT: Good morning.

8 MR. KINNEY: Good morning, Your Honor. Michael  
9 Kinney on behalf of the defendants.

10 THE COURT: I was very happy to see the two of you  
11 smiling collegially at each other. You know, I wish there were  
12 a way we could sit you-all down and work out some kind of a, of  
13 a way of giving some remedy to the, to the juvenile in this  
14 case.

15 Has there been any discussion and is there any  
16 possibility of working something out in this case? Because the  
17 legal hurdles are tough for the plaintiffs, all right? And  
18 this involves, you know, he's now -- is he 17 yet, the John  
19 Doe?

20 MR. BINNALL: I believe he's 16, Your Honor.

21 THE COURT: He's 16, all right.

22 MR. BINNALL: Right in that 16-17 area.

23 THE COURT: Yeah. I mean, you know, look, we're  
24 dealing with someone who was what, a sophomore when this  
25 occurred?

1 MR. BINNALL: Yes, Your Honor.

2 THE COURT: So he is starting his junior year.

3 MR. BINNALL: Yes, ma'am.

4 THE COURT: All right. And I understand he's now in  
5 a new high school, not in the alternate -- in the alternative  
6 high school, right?

7 MR. BINNALL: That's right, Your Honor.

8 THE COURT: It's not his home base high school?

9 MR. BINNALL: It is not, Your Honor.

10 THE COURT: All right. Does he drive, or does his  
11 family have to transport him to --

12 MR. BINNALL: My understanding is his family is  
13 actually transporting him right now on --

14 THE COURT: Yeah.

15 MR. BINNALL: -- through their, their own means.

16 THE COURT: Yeah. It's a very sad case, it's a very  
17 troubling case, and it's obviously a very current case. But  
18 has there been any effort to try to see if there's a  
19 resolution? Mr. Kinney?

20 MR. KINNEY: Your Honor, there has not been.

21 THE COURT: Have you handled more of these cases? I  
22 mean, do you represent the School Board in these types of  
23 cases?

24 MR. KINNEY: I represent the School Board generally.  
25 This is my first Title IX case, Your Honor.

1           THE COURT: It's the first one of this type that I've  
2 had, and, you know, you can understand, I mean, it's a really  
3 difficult situation because the schools absolutely have an  
4 obligation to avoid any kind of harassing environment or  
5 threatening environment for any student, and yet one would have  
6 to be an idiot not to recognize, especially for young  
7 teenagers, that, you know, they're interested in sex, they are  
8 foolish in how they act, they can have grudges.

9           You know, all of us were teenagers at one time and  
10 can think back to our lives in high school. And the  
11 implications for this type of discipline on this young man's  
12 record will go with him for some time.

13           I, you know, I don't know what the impact is with  
14 college admissions when they look at something like this. I  
15 don't know how it shows up on the record. I mean, that's part  
16 of the issue that the plaintiff has raised in the complaint,  
17 but there are, you know, lasting consequences from a, you know,  
18 foolish adolescent activity, you know, that could have a  
19 long-term impact on his life.

20           At the same time, for the, for the girls who felt  
21 intimidated or mistreated by his conduct, I understand that for  
22 them, too, it can have some kind of an effect, although theirs  
23 is a bit different because it's not showing up, as I  
24 understand, on any record.

25           The other thing that bothers me about this case --

1 I'm giving you a long spiel about it because I think the law is  
2 one thing and the Court's view of it may be different -- I'm  
3 very troubled as a fact finder with the first girl's complaint  
4 because this is a, you know, there was a serious allegation by  
5 her about the exposure, all right, and then she retracts it.

6 Now, in any other evidentiary context, a witness or  
7 victim who makes that strong an allegation of misconduct and  
8 then retracts it becomes inherently incredible, and at the very  
9 least, there would have to have been in my view, and if I were  
10 conducting an evidentiary hearing in this kind of a setting, I  
11 would have made sure that that credibility of that witness was  
12 very carefully vetted, and I would be inclined not to believe  
13 that particular witness because that's a pretty serious -- we  
14 don't know from this record, you know, well, why did she say  
15 that in the first place? Then why did she admit that she had  
16 not said it?

17 So there are troubling things in this record, and --  
18 anyway, you were going to tell me that you have had a little  
19 bit of experience, though, with the School Board.

20 MR. KINNEY: Yes. Yes, Your Honor. And if I may  
21 just address that last, last point?

22 THE COURT: Yes.

23 MR. KINNEY: Even if that first student's accusation  
24 was completely disregarded, there were at least six other  
25 students that supported this finding and the plaintiff's own

1 admissions.

2 THE COURT: Okay. There's no question on this record  
3 that the boy said those very offensive things that he said. I  
4 mean, he admits it, which gives him some credibility, too, by  
5 the way. It's like a criminal defendant who comes in and says:  
6 Yes, Judge, I sold the cocaine, and I sold the marijuana, but I  
7 didn't sell the heroin.

8 You know, you start to believe somebody like that, I  
9 mean, admitting that. So he admitted the statements, and that  
10 was a question I had for you. If there were no touching, would  
11 the School Board have issued the same type of discipline if it  
12 were just the statements?

13 MR. KINNEY: I -- Judge, I don't know that I can  
14 credibly say one way or the other, but, but we have a principal  
15 who's confronted by three young women making this accusation,  
16 and then those accusations were explained to the plaintiff, and  
17 he admitted to some of them, he denied others of them, and it  
18 was within the principal's discretion, if you will, on the  
19 ground at the time, after explaining the charges, as I said,  
20 after getting the plaintiff's responses to those charges, to,  
21 to impose up to ten days' suspension.

22 So, you know, without, without the touching, I just  
23 don't know, but I think given what -- given the words that the  
24 plaintiff has admitted he said to at least two other female  
25 students, the principal could very well have imposed a ten-day

1 suspension at the time.

2 THE COURT: Yeah. All right. And you're not aware  
3 of any -- I mean, let me hear from plaintiff's counsel.

4 Mr. Binnall, what is your understanding of how these  
5 types of incidents stay on a student's record?

6 MR. BINNALL: Your Honor, my understanding is they do  
7 stay on the record, but there's something even more important  
8 than staying on the record, and that is, what students are  
9 obligated to answer truthfully when they apply to colleges.  
10 The, the uniform college admission forms recently changed, and  
11 they, quote-unquote, banned the box when it comes to criminal  
12 convictions, but they still ask about other disciplinary  
13 matters, and so it's actually not hyperbole to say for getting  
14 into colleges, this is actually now worse than a criminal  
15 conviction because colleges and other employers down the line  
16 are going to be asking and will ask him if he has been found  
17 responsible for something like a Title IX violation. He will  
18 be bound to say yes to answer truthfully.

19 And with that being as it is right now, that is  
20 probably his biggest hurdle going forward for how this will  
21 affect his, his career unless we can find some way to first of  
22 all say that the proper processes in Title IX and the other  
23 constitutional safeguards that we've, that we've pled were not  
24 protected here unless, of course, the parties are able to work  
25 out some other sort of solution.

1           And I think there are creative things that can be  
2 done with this. I think there would be no reason why we  
3 couldn't work with a magistrate judge and try to see if we can  
4 put our heads together and come up with other solutions. We  
5 would be willing to do that.

6           THE COURT: What's the status of the state court  
7 proceeding? Because you've taken an appeal, right, to the  
8 Fairfax Circuit Court?

9           MR. BINNALL: That's right, Your Honor.

10          THE COURT: Which judge has the case at this point,  
11 do you know?

12          MR. BINNALL: Judge Garner has a motion to stay  
13 pending before him.

14          THE COURT: Because of this case?

15          MR. BINNALL: Yes, Your Honor. And that's -- the  
16 issue really before Judge Garner on that is efficiency --  
17 judicial efficiency and efficiency of the parties, is if we are  
18 successful in this case, there won't be any need to do that,  
19 but the opposite is not true. Even if we lost in that case,  
20 the standard -- the statutory standard being what it is, we  
21 would still be able to proceed with this case.

22          THE COURT: And exactly what is the cause of action  
23 in the, in the circuit court? Is it like an administrative  
24 review that this Court would do an APA type of review?

25          MR. BINNALL: Yes, Your Honor.



1 THE COURT: So it's what, abuse of --

2 MR. BINNALL: Abuse of discretion.

3 THE COURT: Arbitrary and capricious?

4 MR. BINNALL: Arbitrary and capricious or abuse of  
5 discretion, I think, is the, the buzz words that the, that the  
6 statute uses in order to look at that. So in other words, just  
7 because something is not arbitrary and capricious, you know,  
8 when you're limited to the record as it is, when you're not  
9 able to go outside of the record as we are in the 1983 action,  
10 as we are in the Title IX claim.

11 THE COURT: Were you the attorney of record below?  
12 Did you represent the plaintiff, John Doe, at the proceedings?

13 MR. BINNALL: No, Your Honor, I did not. I was  
14 brought in for the litigation afterwards. So I am counsel of  
15 record on the appeal in circuit court in Fairfax. I was not  
16 counsel at the, at the school --

17 THE COURT: But the parents did have counsel. The  
18 boy did have an attorney, right?

19 MR. BINNALL: They did, Your Honor, yes.

20 THE COURT: Do you know how -- is there a transcript  
21 of the hearing?

22 MR. BINNALL: Yes, ma'am. There's, there's a  
23 transcript -- what we are hoping in discovery, because there is  
24 a transcript, we believe that there are some serious errors in  
25 the transcript. There's also a recording of the transcript.

1           What we're hoping to get in discovery is the actual  
2 recording to actually compare it to the transcript so that  
3 those two can be compared adequately so that we can get a very  
4 accurate record of what happened at that hearing.

5           The one thing -- there's a few very troubling things  
6 that we know that happened at the hearing. First of all, it  
7 was -- the investigator provided simply summary evidence of  
8 these are what's said, not who said them, no way to actually  
9 test that.

10           Of course, as the Court pointed out, there was a very  
11 critical retraction from, from one of the witnesses that had  
12 the very serious --

13           THE COURT: That was the most serious allegation, I  
14 think.

15           MR. BINNALL: The most serious allegation.

16           And the other, the other allegations -- the only  
17 other allegation that involved touching is an allegation that  
18 was denied categorically in which my client passed a polygraph  
19 examination for. Now, that polygraph examination may very well  
20 not be admissible in this court, but you can't very well say as  
21 a matter of due process that it's due process for me and not  
22 for thee, or it's rules of evidence for me and not for thee is  
23 probably more accurate for me to say, where they get in -- they  
24 get to go in and provide summary evidence, with no opportunity  
25 for my client to test that through any kind of

1 cross-examination or other questions, not necessarily direct  
2 cross-examination but some method to actually question the  
3 veracity of the evidence against my client, and it's just  
4 summary evidence, and based on the -- and it's really  
5 interesting that when the hearing officers make the decision,  
6 they base it on the veracity not of the people who are  
7 witnesses but only because they believe the school official,  
8 only because they believe the investigator, not on what the  
9 evidence is.

10           So you have this, this summary evidence that's  
11 presented against my client, and then my client comes up,  
12 testifies himself, is subject to questioning. He presents a  
13 polygraph examination showing no deception indicated, something  
14 that is from a reputable polygraph examiner, a psychosexual  
15 risk analysis showing that he's no risk there, other evidence  
16 that is really, as you can see from the report, just really not  
17 considered. And they take and go into detail in the report  
18 about the allegations and just disregard that other testimony  
19 for him completely.

20           And so that's the problem with the -- just some of  
21 the problems that we really have that we've pled with the, with  
22 the hearing itself is it was a predetermined result. It didn't  
23 matter if my client had come in with Clarence Darrow. It was  
24 not going to be something that he had a fair shot with.

25           THE COURT: How long was the hearing, do you know?

1 MR. BINNALL: Your Honor, I haven't pled that. I  
2 know that in the back of my head. My client's father is in the  
3 courtroom, and he would probably have a better idea, if I could  
4 ask him.

5 The other question is how much time, I think, was  
6 really allotted for my client's presentation of the case would  
7 be, I think, an important question.

8 THE COURT: Well, as you, as you both know, I wanted  
9 to see the report that came out. It's a relatively short  
10 report, and actually in terms of substantive findings, it's  
11 very short. Most of the report has to do with the procedures,  
12 you know, what rights you have for appeal and that sort of  
13 thing.

14 Again, the problem is if this were any other kind of  
15 a proceeding, the -- I would have no problem in finding on the  
16 record I have before me at this point that there was inadequate  
17 due process. It does not strike the Court that this would have  
18 been an adequate hearing. You can't have that kind of double  
19 hearsay with the key witnesses, where one has made a major  
20 retraction. I just can't find any -- that that would work.

21 The trouble is the law appears to indicate that for  
22 students, their scope of their rights is much, much less than  
23 it would be for you or I if we were in this kind of a -- for  
24 you or me if we were in one of these hearings, and that's the  
25 legal hurdle that I see in this case that I'm sure you

1 appreciate.

2 MR. BINNALL: I do appreciate that, Your Honor. And  
3 I do these cases actually all over the country, and one  
4 interesting thing that's going on in the development of this  
5 law is the law in this area has developed pretty substantially  
6 just over the last few years since the prior administration's  
7 Office of Civil Rights became very active in going after  
8 schools in their funding for Title IX purposes, and it caused a  
9 bit of a wave in the other direction. So courts are looking at  
10 this now, and they're coming to a very different conclusion.

11 Now, we don't have a lot of Fourth Circuit law on  
12 that yet. That's still building. It's still to come. Judge  
13 Ellis has had a couple of interesting cases here that have  
14 dealt with some of these issues, and some other places have.

15 The Sixth Circuit has dealt with this probably more  
16 than any other circuit right now as well as some out of the  
17 Second, and the Sixth Circuit is reaching a different  
18 conclusion, that there has to be meaningful due process, and  
19 this goes, goes back all the way to *Goss* in the, in the '70s,  
20 where it doesn't have to be the same process that you would get  
21 in a courtroom, but it has to be meaningful, and it has to be  
22 actual due process.

23 So just coming in and having what some schools have,  
24 which is a single investigator model where there's actually no  
25 hearing, and this is only a slight step above this, because you

1 have an investigator that conducts a very, very limited  
2 investigation and just says -- comes in and essentially says:  
3 I believe the sole witnesses that I interviewed, even though  
4 there's all this other body of evidence that I didn't even look  
5 at. I believe these witnesses, not going to give any other  
6 relevant information about their veracity other than to say  
7 that one witness, the most important witness, recanted a  
8 critical part of her allegation.

9 And with -- and so these courts, the Sixth Circuit,  
10 the Second Circuit, and some other circuits, are saying no,  
11 that's not enough. You don't get there. Due process has to be  
12 more substantive than that. It has to -- while you don't have  
13 to have a moot court system going for these things, it has to  
14 be meaningful. You have to have some method, for instance,  
15 just recently held in a case I think we cited, the *Doe v.*  
16 *University of Cincinnati* case, you have to have some method to  
17 question the accuser, for instance. It doesn't have to be that  
18 it's face-to-face. It can be some method of submitting  
19 questions that are then asked through, through a hearing  
20 officer, but there has to be some method of confrontation.

21 And the way that the law is, is developing on this  
22 all over the country right now is that there needs to be more  
23 due process for these students because someone like John Doe  
24 No. 2, his future and his career is very, very substantially  
25 compromised by this unless we find a way to balance the need,

1 and there is certainly a need, of protecting victims of  
2 assault, with at the same time providing everyone due process  
3 to make sure that something equally bad doesn't happen, which  
4 is people are stained for the rest of their lives for something  
5 they didn't do.

6 THE COURT: Okay. Well, here's what I'm going to do  
7 today: There are a couple of very simple issues in the motion  
8 to dismiss. The first is that the Fairfax County Public  
9 Schools is not a proper defendant, that it should be the School  
10 Board, and you really haven't opposed that, and I think to  
11 clean up the complaint, that's proper.

12 MR. BINNALL: And based on what they said in their  
13 reply --

14 THE COURT: Yeah.

15 MR. BINNALL: -- I think we're clear that the School  
16 Board is on the hook for Title IX.

17 They're the only entity.

18 THE COURT: Right. So we're going to grant that part  
19 of the defendants' motion. And also, that the Title IX claims,  
20 that's Count 1, really would only apply to the School Board. I  
21 don't think they can go to individuals. And I think you're  
22 agreeing with that.

23 MR. BINNALL: We agree, Your Honor.

24 THE COURT: So we're going to clean up the complaint  
25 in that respect as well.

1           At this point, I'm going to allow the Title IX claim  
2 to go forward as to the School Board. I am concerned about  
3 this case. The First Amendment issue is a really interesting  
4 one. As I said, at this point, I'm going to let that case --  
5 that count go forward. I'm not sure that it really -- the kind  
6 of speech involved here would under *Tinker* really -- and also  
7 under the circumstances as you've depicted them, which is most  
8 of them not made directly to the alleged victims but overheard,  
9 I think we have to have a more developed record on that issue.

10           So I'm going to grant the motion to dismiss in part  
11 and deny it in other respects. I'm going to strongly urge both  
12 sides to think as carefully and creatively as possible to see  
13 if there is some equitable and appropriate way that this might  
14 be resolved. It may not be, and as I said, I will be watching  
15 the law as it evolves in this case, but if I haven't already --  
16 and I don't think we've issued a scheduling order -- yes, we  
17 have, all right.

18           So discovery has started; is that correct?

19           MR. BINNALL: Yes, Your Honor.

20           THE COURT: Yes.

21           MR. BINNALL: I think initial disclosures are due  
22 today.

23           THE COURT: All right, that's fine. So that's my  
24 ruling in this case. Thank you.

25           MR. KINNEY: Your Honor, if I may?



1 THE COURT: Yeah.

2 MR. KINNEY: I didn't hear a ruling as to the due  
3 process claim.

4 THE COURT: Oh, the due process claim, I thought you  
5 picked that up at this point. At this point, I'm leaving that  
6 issue in, yeah. That's part of what the discovery is going to  
7 develop one way or the other, yep. Thank you.

8 MR. BINNALL: Thank you, Your Honor.

9 (Which were all the proceedings  
10 had at this time.)  
11

12 CERTIFICATE OF THE REPORTER

13 I certify that the foregoing is a correct transcript of  
14 the record of proceedings in the above-entitled matter.  
15  
16

17 /s/  
18 \_\_\_\_\_  
19 Anneliese J. Thomson  
20  
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